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No. 00-852

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DOUGLAS L. PATCH, BRUCE B. ELLSWORTH, and SUSAN S. GEIGER,

Petitioners,

v.

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION ACTUALLY PRESENTED

The legal question that is actually presented under the filed-rate doctrine is as follows:

> Did the Court of Appeals properly hold that a state public utilities commission, having ordered a utility not to terminate wholesale power purchases under a tariff approved by the Federal Energy Regulatory Commission, must, under the filed-rate doctrine as enunciated in *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), permit that utility to recover its full wholesale power costs through its retail rates?

Contrary to the Petition, no question involving the Johnson Act, 28 U.S.C. § 1342, is properly presented. The Petition misstates the question presented by ignoring the fact that the New Hampshire Public Utilities Commission ordered respondent Connecticut Valley Electric Company to continue making wholesale power purchases from its parent, respondent Central Vermont Public Service Corporation, pursuant to a tariff approved by the Federal Energy Regulatory Commission, and expressly vacated its original order directing Connecticut Valley to terminate that wholesale power purchase arrangement.

RULE 29.6 STATEMENT

Respondent Central Vermont Public Service Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Connecticut Valley Electric Company is the wholly-owned subsidiary of Central Vermont Public Service Corporation.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents Connecticut Valley Electric Company ("Connecticut Valley") and Central Vermont Public Service Corporation ("Central Vermont") hereby oppose the Petition filed by the Commissioners of the New Hampshire Public Utilities Commission ("NHPUC") because (1) the Petition misstates the question presented and the holdings by the District Court and First Circuit, and (2) the decisions below are correct, create no conflict among the circuits, involve at most an indisputable factual finding, and raise no substantial federal issue requiring review by this Court.

COUNTER-STATEMENT OF THE CASE

This case arises from the NHPUC's attempt to restructure the New Hampshire retail electric industry from a traditional cost-based, regulated system to a competitive "retail choice" system. In doing so, the NHPUC has refused to recognize the federal rights of Connecticut Valley and its parent, Central Vermont, to recover the wholesale power costs they incurred to fulfill their obligations to serve their retail customers in New Hampshire. Connecticut Valley obtains the bulk of its wholesale power requirements from Central Vermont through a long-term wholesale power supply agreement, the RS-2 Rate Schedule ("RS-2") (Petition Appendix ("Pet. App.") 81-108), which the Federal Energy Regulatory Commission ("FERC") has approved. The NHPUC initially attempted to force Connecticut Valley to terminate that agreement on supposed prudence grounds so that Central Vermont, a Vermont-based utility, would have to absorb the "stranded costs" of the long-term power-purchase contracts it made to supply the power that Connecticut Valley needs for its New Hampshire customers. However, when Central Vermont filed a request with FERC for a federally authorized "exit-fee" to recover its stranded costs upon termination of the RS-2 Rate Schedule, the NHPUC switched positions, retracted its earlier order directing such termination,

and instead required Connecticut Valley to continue making such wholesale power purchases under RS-2. Nevertheless, despite its dramatic change in position, the NHPUC still refused Connecticut Valley full recovery of the RS-2 wholesale supply costs through its retail rates.

The District Court held that the NHPUC cannot have it both ways, that the NHPUC's retraction of its earlier order requiring termination thoroughly discredited the NHPUC's contention that Connecticut Valley's continuing RS-2 purchases were imprudent, and consequently found that there was no basis for an exception to the NHPUC's obligation, under the filed-rate doctrine and the Supremacy Clause of the United States Constitution, to allow Connecticut Valley to recover all the costs it has incurred under the FERC-approved rate schedule. *Public Service Co. of N.H. v. Patch*, 87 F. Supp. 2d 57, 64-65 (D. N.H. 2000) (Pet. App. 26-28) ("*Patch VII*").[1] The First Circuit, also grounding its decision on the NHPUC's change in position on RS-2 termination, affirmed. *Public Service Co. of N.H. v. Patch*, 221 F.3d 198, 202-203 (1st Cir. 2000) (Pet. App. 8-10) ("*Patch VIII*"). The NHPUC's petition for rehearing and rehearing *en banc* was denied. (Petition at 1)

Astonishingly, the Petition completely ignores the fact that the decisions below are based on the NHPUC's change of position on termination — notably, its ultimate position that the wholesale supply arrangement should remain in effect.

1. Respondents follow the shorthand references to the decisions in this case used by the First Circuit and the Petition. *Public Serv. Co. of N.H. v. Patch*, 962 F. Supp. 222 (D.N.H. 1997) (*Patch I*); *Public Serv. Co. of N.H. v. Patch*, 173 F.R.D. 17 (D.N.H. 1997) (*Patch II*); *Public Serv. Co. of N.H. v. Patch*, 136 F.3d 197 (1st Cir. 1998) (*Patch III*); *Public Serv. Co. of N.H. v. Patch*, 167 F.3d 15 (1st Cir. 1998) (*Patch IV*); *Public Serv. Co. of N.H. v. Patch*, 167 F.3d 29 (1st Cir. 1998) (*Patch V*), *cert. denied*, 526 U.S. 1066 (1999); *Public Serv. Co. of N.H. v. Patch*, 202 F.3d 29 (1st Cir. 2000) (*Patch VI*); *Public Serv. Co. of N.H. v. Patch*, 87 F. Supp. 2d 57 (D.N.H. 2000) (*Patch VII*); *Public Serv. Co. of N.H. v. Patch*, 221 F.3d 198 (1st Cir. 2000) (*Patch VIII*).

STATEMENT OF FACTS

Central Vermont and Connecticut Valley Form One Power Supply System

Connecticut Valley is a New Hampshire public utility that supplies electric power to approximately 10,000 customers in the Connecticut River valley along the New Hampshire-Vermont border adjacent to Central Vermont's service area in Vermont. Connecticut Valley, the smallest investor-owned utility subject to rate regulation by the NHPUC, is a wholly-owned subsidiary of Central Vermont, a Vermont public utility. Central Vermont and Connecticut Valley have supplied electric power to their New Hampshire customers for approximately 70 years, and for the last 50 as separate but affiliated companies. Connecticut Valley purchases approximately 76% of its wholesale power supply needs from Central Vermont under RS-2, an interstate wholesale requirements rate schedule authorized by FERC.[2] Connecticut Valley has purchased power from Central Vermont since it began operations in 1949, and it has purchased such power under RS-2 since 1982. (Affidavit of William J. Deehan, dated Jan. 18, 1999 ("Deehan Aff."), ¶¶ 2-9)

Central Vermont has continuously supplied Connecticut Valley with all the power (except what Connecticut Valley is required to take from QFs) and non-power services that its customers require as a slice of the consolidated system, with the two affiliates essentially operating as one entity. Central Vermont has always treated Connecticut Valley's retail load in New Hampshire as part of the consolidated system's native load which has been included in all of its power supply forecasts, plans and purchases. Consequently, Central Vermont has made substantial, long-term commitments for power supply resources

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2. The NHPUC requires Connecticut Valley to purchase the remainder of its power needs from high-cost "qualifying facilities" ("QFs") under the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 824a-3, and also under New Hampshire's Limited Electrical Energy Producers Act, N.H.R.S.A. ch. 362-A.

to serve the consolidated system's load, including Connecticut Valley's obligation to New Hampshire customers, at the lowest possible projected costs consistent with long-term reliability of supply. Under the FERC-approved RS-2 Rate Schedule (Pet. App. 81-108), Connecticut Valley is allocated its proportionate share of the costs of the consolidated system's power supply resources. Central Vermont supplies Connecticut Valley with such purchased power at cost, with no mark-up for rate of return or other measure of profit. (Affidavit of Bruce W. Bentley, dated Jan. 18, 1999 ("Bentley Aff."), ¶¶ 2-8, 21-22)

The NHPUC has consistently looked to Central Vermont to fulfill the duty to supply the necessary power for Connecticut Valley's New Hampshire retail customers subject to the NHPUC's regulation of the consolidated system's integrated resource planning.[3] With the NHPUC's encouragement and approval, therefore, Central Vermont and Connecticut Valley made long-term commitments for reliable power on a single-system basis. (Bentley Aff. ¶¶ 6-8, 21-22)

The NHPUC's Restructuring Initiative

This case involves the NHPUC's effort, pursuant to New Hampshire's Electric Utility Restructuring Act, N.H.R.S.A. §§ 374-F:1 to F:6, to change from the traditional cost-based regulatory system to competition. Central Vermont and Connecticut Valley have challenged the NHPUC's plan to shift to market-based rates because it fails to compensate them for the investments and long-term contractual commitments they made to fulfill their obligations to provide a reliable power supply for their New Hampshire customers.

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3. In 1992, for example, in approving Connecticut Valley's 1990 long-term power supply plan, the NHPUC stated that "[w]e have taken into account CVEC's affiliation with CVPS and that CVEC's LCIP [Least Cost Integrated Plan] filing reflects planning for the consolidated company." (Report and Order No. 20,450, in DE 90-053, Apr. 22, 1992; Bentley Aff. ¶ 13)

On February 28, 1997, the NHPUC issued its "Final Plan" in its Electric Utility Restructuring Docket (Order No. 22,514 in Docket DR 96-150) and related Orders for Interim Stranded Costs for each New Hampshire utility, including Connecticut Valley. As part of this package of orders, the NHPUC issued an Interim Stranded Costs Order (No. 22,509) that directed Connecticut Valley to cancel its wholesale power supply contract with Central Vermont, on the purported ground that Connecticut Valley had been imprudent in not terminating that contract. Simultaneously, the NHPUC denied Connecticut Valley recovery of stranded costs related to that wholesale supply contract.

The RS-2 Rate Schedule

Pursuant to the RS-2 formula, each year on or before December 1, Central Vermont makes a filing with FERC that includes estimated purchased power costs that it will include during the next year in the rate for the wholesale power Central Vermont supplies to Connecticut Valley. That same formula results in a corresponding adjustment of Connecticut Valley's retail rates. Connecticut Valley recovers only its cost of the power supplied by Central Vermont, earning no rate of return on that component, since the integrated company has always been viewed as responsible for service to New Hampshire. (Deehan Aff. ¶¶ 6, 47, 49-50; Pet. App. 81-108)

Connecticut Valley uses these RS-2 wholesale power charges as the primary input into its annual Fuel Adjustment Clause/Purchased Power Cost Adjustment ("FAC/PPCA") filing that it submits to the NHPUC. The purpose of the FAC/PPCA proceeding is simply to reflect the currently applicable purchased power costs for the retail rates in the upcoming year. Such updated cost filings are essentially ministerial matters that the NHPUC has routinely granted in their entirety or with only minor modifications. (Deehan Aff. ¶¶ 47, 50)

Central Vermont serves its annual FERC RS-2 filings on the NHPUC, and the NHPUC has the right to intervene before

FERC to question any Central Vermont cost data that will be incorporated in the RS-2 rate formula. The NHPUC intervened in the FERC RS-2 filing that Central Vermont made in December 1997, but never objected to any of the wholesale power costs that Central Vermont proposed to include in the RS-2 Rate Schedule. On January 13, 1998, FERC accepted Central Vermont's RS-2 filing applicable to prospective 1998 charges. (Deehan Aff. ¶¶ 51-54)

The NHPUC's Disallowance Order of December 31, 1997

Based upon the cost data in Central Vermont's FERC RS-2 filing, Connecticut Valley filed its annual FAC/PPCA cost adjustment proceeding for 1998 before the NHPUC on November 26, 1997. On November 17, 1997, the City of Claremont, New Hampshire had filed a complaint before the NHPUC seeking to reduce Connecticut Valley's retail rates. Claremont based its request solely on the NHPUC's Interim Stranded Costs Order (No. 22,509) in the restructuring docket holding Connecticut Valley imprudent for not terminating RS-2. (Pet. App. 109-116)

The Claremont complaint was consolidated with the FAC/PPCA rate case. At the December 17, 1997 hearing, the accuracy and foundation for Connecticut Valley's calculations supporting its FAC/PPCA rate adjustments were not challenged, nor was there any claim that the costs were not actually being incurred pursuant to RS-2. Claremont complained only that the rate was higher than what it believed to be the market price. No evidence regarding the prudence of the Connecticut Valley wholesale power supply contract with Central Vermont was introduced. (Pet. App. 110, 114-116)

On December 31, 1997, the NHPUC issued Order No. 22,815 (Pet. App. 109-119) freezing Connecticut Valley's rates at the 1997 level and repeating the holding in the restructuring docket that Connecticut Valley had acted imprudently by not terminating its purchases from Central Vermont and buying power on the spot market. The NHPUC

specifically cited the fact that Connecticut Valley had continued its RS-2 purchases "in disregard for the concerns" the NHPUC had raised in its February 28, 1997 Interim Stranded Costs Order directing Connecticut Valley to terminate RS-2. In fact, the NHPUC relied solely on that prior order entered in its restructuring docket, heard no evidence concerning the prudence of Connecticut Valley's continuing purchases from Central Vermont, and conducted no independent analysis of prudence.

Because of the serious procedural and substantive defects in the NHPUC's order, Connecticut Valley sought a rehearing, at which it produced substantial evidence demonstrating the prudence of its RS-2 purchases. (NHPUC Order No. 22,838, dated Jan. 20, 1998, at 2-3) However, the NHPUC never issued an order reflecting a reconsideration of its imprudence finding in light of all the evidence.

Instead, on February 23, 1998, the NHPUC stated its intent to impose an absolute cap, through a market price "proxy" of $.04 per kilowatt hour, on the FERC-authorized wholesale power costs that Connecticut Valley could recover through its retail rates. (Deehan Aff. ¶ 56) The NHPUC thus threatened that it would immediately switch Connecticut Valley from cost-based rates to market-based rates without regard to the financial consequences for Connecticut Valley or whether it could even stay in business. Connecticut Valley and Central Vermont immediately sought injunctive relief in federal court to avoid the irreparable injury that they would sustain from the NHPUC's imminent action.

Central Vermont's and Connecticut Valley's Claims in Federal Court and at FERC

To secure compensation for the stranded costs their integrated power system will sustain as a result of FERC's new open access transmission policies and resulting State restructuring initiatives, Connecticut Valley and Central Vermont have pursued simultaneous claims in this federal litigation and

through Central Vermont's request for an exit fee at FERC.[4] Connecticut Valley and Central Vermont, of course, do not seek duplicate recovery. Since they form one integrated system, Connecticut Valley and Central Vermont were compelled to pursue both proceedings to ensure that any procedural barrier in one proceeding would not defeat their right to compensation.

Both the constitutional claims that Connecticut Valley and Central Vermont have made in federal court to secure just compensation for their FERC-authorized wholesale supply costs and the exit fee Central Vermont has sought at FERC to recover those costs are based upon essentially the same underlying facts. Central Vermont's integrated system had a reasonable expectation that it would be able to recover the costs of the long-term wholesale commitments it made to secure reliable power that Connecticut Valley was legally obligated to supply to its New Hampshire retail customers. Central Vermont's exit fee request has proceeded to a full evidentiary hearing before an administrative law judge with respect to the duration of Central Vermont's reasonable expectations that it would continue to supply the wholesale power needed to serve Connecticut Valley's New Hampshire load, but no decision has yet been made.

Under FERC's procedures, the exit fee will be triggered immediately upon termination of RS-2. The exit fee will come into force on a provisional basis immediately upon termination, even though the proceeding at FERC would continue to

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4. An "exit fee" is the "charge that will be payable by a departing generation customer upon the termination of its requirements contract with a utility (if the utility is able to demonstrate that it reasonably expected to continue serving the customer beyond the term of the contract), whether payable in a lump-sum payment or on amortization of a lump-sum payment." *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, FERC Order No. 888-A, 78 FERC ¶ 61,220; 1997 FERC LEXIS 463 (March 4, 1997), at *55, n.571.

determine the ultimate amount of that fee. *See Patch VIII*, 221 F.3d at 202. Consequently, the NHPUC faced the prospect that at any time an exit fee would come into force upon Connecticut Valley's termination of RS-2 — precisely what the NHPUC was then demanding Connecticut Valley do. To forestall that result, the NHPUC reversed its position on termination.

The NHPUC's Direction to Connecticut Valley Not To Terminate the RS-2 Rate Schedule

The NHPUC based its imprudence finding in the restructuring docket on the RS-2 Rate Schedule's "evergreen" clause (Pet. App. 82), which it claimed allowed Connecticut Valley to terminate its wholesale purchases from Central Vermont upon one-year's notice with no obligation for stranded costs. The NHPUC's rationale for its imprudence finding was that Connecticut Valley could have given such notice and then obtained wholesale power on the open market as of January 1, 1998. The NHPUC relied upon the same rationale in later freezing Connecticut Valley's rates at their December 31, 1997 level and in stating that it would impose a market price cap on Connecticut Valley's wholesale power costs. (Pet. App. 117-118)

The RS-2 evergreen clause is also at the core of Connecticut Valley's and Central Vermont's claims in the District Court. The evidence they have submitted, and the undisputed public record, demonstrates that there never was any intent to allow an unconditional termination of Connecticut Valley's obligation to purchase its wholesale power requirements from Central Vermont regardless of the substantial, long-term commitments that Central Vermont entered into to obtain the power that Connecticut Valley needs for its New Hampshire customers. (Deehan Aff. ¶¶ 41-46) Indeed, the First Circuit has recognized the substantial

question raised by Connecticut Valley and Central Vermont concerning the meaning and effect of the evergreen clause:

> At best, the state agency may be exploiting a possible drafting mistake — the short-notice termination clause in the original contract between the two utilities — to shift to Central Vermont (or to Vermont ratepayers) what may well have been Connecticut Valley's prudently incurred costs of achieving long-term rate protection for its New Hampshire customers. *Patch VI*, 202 F.3d at 34; Pet. App. 65.

But the District Court held that it did not have to reach that substantial factual issue because, on July 22, 1998, the NHPUC, recognizing that Connecticut Valley's termination of RS-2 could immediately trigger the exit fee, reversed course and vacated that portion of its February 27, 1997 restructuring order that had directed Connecticut Valley to terminate its RS-2 wholesale power purchases from Central Vermont. (Order No. 22,986, July 22, 1998; Pet. App. 68-73) The NHPUC has expressly explained that this Order "clarif[ied] that CVEC [Connecticut Valley] should not terminate the RS-2 Rate Schedule if such termination would trigger the exit fee" for which Central Vermont has sought authorization from FERC. (Memorandum in Support of Defendants' Motion Summary Judgment, dated Jan. 19, 1999, at 9) The NHPUC has stated both to the District Court and the First Circuit that its July 22, 1998 order directs Connecticut Valley not to terminate RS-2 to prevent such termination from entitling Central Vermont to compensation for its stranded costs resulting from the loss of Connecticut Valley as a wholesale customer, which in turn would entitle Connecticut Valley to recover that exit fee through the retail rates paid by its New Hampshire customers. (Hearing Tr., Oct. 20, 1999, at 34; NHPUC Reply Br. in 1st Cir. No. 99-1974, at 6)

Through its switch in position on termination, the NHPUC sought to compel Connecticut Valley to continue to purchase

its RS-2 wholesale power requirements from Central Vermont even though its retail rates were frozen at a level that did not allow it to recover its full RS-2 costs.

The Irreparable Harm from the NHPUC's Actions

Central Vermont and Connecticut Valley submitted uncontradicted evidence to the District Court that the NHPUC's refusal to allow Connecticut Valley to recover through its retail rates the annual FERC-authorized RS-2 cost adjustments for the wholesale power that it purchases from Central Vermont threatened them with immediate irreparable financial harm. (Affidavit of James M. Pennington, dated Jan. 18, 1999) Based upon that evidence, the District Court issued a permanent injunction mandating Connecticut Valley's full recovery of its RS-2 wholesale power costs because "[n]o electric utility can long survive if its retail rates produce less revenue than it has to pay to purchase the power delivered to its retail customers." *Patch VII*, 87 F. Supp. 2d at 64; Pet. App. 27.

PROCEEDINGS BELOW

This case has proceeded on two tracks. The District Court from the outset has stayed implementation of the NHPUC's overall restructuring plan until the merits of all the plaintiff utilities' constitutional and preemption claims are fully decided. The First Circuit has affirmed that preliminary injunction on two separate occasions. *Patch IV*, 167 F.3d at 25-29; *Patch VI*, 202 F.3d at 32; Pet. App. 61.

Despite that stay of restructuring, the NHPUC has attempted to prevent Connecticut Valley from recovering its full wholesale power costs through its retail rates. On December 31, 1997, the NHPUC issued an order freezing Connecticut Valley's rates on the purported ground that its failure to terminate RS-2 was imprudent and stated its intent to restrict Connecticut Valley's recovery of wholesale costs to the current spot market prices. That order was based on the NHPUC's prior order in its restructuring docket — a proceeding that the District Court had

subsequently enjoined — denying Connecticut Valley any stranded cost relief. Given the irreparable injury they faced as a result of the NHPUC's rate-freeze order, Connecticut Valley and Central Vermont sought a preliminary injunction from the District Court requiring the NHPUC under the filed-rate doctrine to permit Connecticut Valley full recovery of its RS-2 costs. The District Court, perceiving the NHPUC's order as an "end run" around its stay of restructuring (Hearing Tr., Apr. 3, 1998, at 41-42), granted the preliminary relief sought because of the irreparable harm established by Connecticut Valley and Central Vermont. (Pet. App. 32-34)

The First Circuit vacated the preliminary injunction requiring the NHPUC to allow Connecticut Valley full recovery of its wholesale power costs on the ground that the NHPUC's purported prudence review was presumed to be a valid exercise of its authority over Connecticut Valley's retail rates and not an interference with FERC-approved wholesale rates. In an effort to balance the equities and limit the irreparable harm incurred until the merits of the plaintiffs' claims against restructuring could be resolved, the First Circuit permitted the NHPUC to lower Connecticut Valley's rates to those existing as of December 31, 1997. However, the Court of Appeals also said that any NHPUC attempt to lower the rates below that level would be subject to review by the District Court to determine whether such action violated its stay of restructuring. *Patch V*, 167 F.3d at 34-35; Pet. App. 45-48.

Upon remand, the NHPUC immediately cut Connecticut Valley's rates to their December 31, 1997 level and also sought to lower them further to recover the rate revenue obtained by Connecticut Valley in excess of that level after the preliminary injunction was granted and before it was vacated. (Order No. 23,168, March 22, 1999; Pet. App. 74-80) The District Court found that any reduction below the December 31, 1997 level would violate its stay of restructuring and therefore enjoined the NHPUC's attempt to do so. (Pet. App. 52-54)

On appeal, the First Circuit again found no basis for the District Court's preliminary injunction interfering with a presumptively valid state agency rate order. However, because fully briefed and argued cross motions for summary judgment were pending before the District Court and could provide the basis for a permanent injunction "requiring the Commission to allow cost pass-throughs of Central Vermont cost increases," *Patch VI*, 202 F.3d at 34, Pet. App. 66, the Court of Appeals did not vacate the District Court's order barring any reduction of Connecticut Valley's rates below the December 31, 1997 level, but instead remanded the matter for a decision within 90 days by the District Court on Connecticut Valley's and Central Vermont's request for such permanent relief.

On March 6, 2000, the District Court granted summary judgment to Connecticut Valley and Central Vermont on Count II of their complaint based upon the filed-rate doctrine.[5] *Patch VII*, 87 F.Supp.2d at 64-65, Pet. App. 26-28. The District Court held that the filed-rate doctrine preempted the NHPUC from disallowing the recovery of wholesale power costs that Connecticut Valley has incurred and continues to incur under the FERC-approved RS-2 Rate Schedule. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371-372 (1988). The District Court concluded that the NHPUC could not rely on its purported

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5. The District Court declined to decide the constitutional and preemption claims stated by that complaint because they closely resemble the claims made by co-plaintiff Public Service Company of New Hampshire ("PSNH") and thus could be affected by the proposed settlement between PSNH and New Hampshire. Moreover, a decision of such issues by the District Court could upset or delay that pending settlement. Accordingly, the District Court was considerate of, and deferential to, the State's efforts to settle with its largest utility. *Patch VII*, 87 F. Supp. 2d at 62, Pet. App. 22.

imprudence determination as an "escape hatch" from the filed-rate doctrine, making the express findings of fact that:

> On July 22, 1998, defendant *rescinded* its previous directive to plaintiff, contained in the Stranded Cost Recovery Order, to terminate the RS-2 Rate Schedule. See Order No. 22,986. This action was obviously based on defendant's desire to avoid the potentially severe adverse consequence of the purchase contract's termination, namely, the imposition of an exit fee on plaintiff [by FERC] that defendant would be required to pass through to New Hampshire retail customers. 87 F.Supp.2d at 64, Pet. App. 26 (emphasis in original).

The District Court saw that the NHPUC's "complete turnaround of its position regarding the desirability of contract termination completely undermines its rationale" for not permitting the recovery of wholesale power costs, and thus its effort to invoke the imprudence exception to the filed-rate doctrine. *Id.* The District Court, therefore, held that the NHPUC's actions were preempted because of "FERC's exclusive jurisdiction over the RS-2 Rate Schedule." The District Court further stressed that the NHPUC "cannot force plaintiff to live under the contract and disallow pass through of plaintiff's wholesale costs validly incurred pursuant to the RS-2 Rate Schedule." *Id*; Pet. App. 27.

Based upon its decision, the District Court issued a permanent injunction requiring the NHPUC to allow Connecticut Valley to recover all its RS-2 wholesale power costs through its retail rates. (Judgment and Permanent Injunction, entered March 21, 2000)

The First Circuit affirmed, holding that the NHPUC's July 22, 1998 order directing Connecticut Valley not to terminate RS-2 had eliminated the NHPUC's grounds for finding Connecticut Valley's RS-2 purchases to be imprudent:

> Of course, FERC has not ordered the state commission to do anything; it has merely allowed

Central Vermont to file a federal tariff (the RS-2 tariff) setting a rate for wholesale power sales to Connecticut Valley. But if the purchase is not improper, then the refusal of the state commission to allow the purchasing utility to pay the federal tariff rate, and include that cost in its own rates, is inconsistent with the federal scheme. The reason is that the rates set by the FERC tariff are binding unless and until altered by FERC. See Mississippi Power & Light Co., 487 U.S. at 371-74; Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 970, 90 L. Ed. 2d 943, 106 S. Ct. 2349 (1986).

Nevertheless, while the Supreme Court left the issue open, we held in Patch V that a state commission could disallow costs, even where they reflected payments required under a federal tariff, where the state agency had a colorable independent state ground for finding that the purchaser should not have made the purchase. 167 F.3d at 35; see also Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n. 837 F.2d 600, 608-09 (3d Cir.), cert. denied, 488 U.S. 941, 102 L. Ed. 2d 355, 109 S. Ct. 365 (1988). And, initially, the Commission did make a colorable ruling in its Disallowance Order that Connecticut Valley's continued purchasing from Central Vermont was imprudent, given Connecticut Valley's apparent opportunity to terminate its contract on one year's notice and switch to cheaper — albeit possibly short-term — power from other suppliers.

But faced with the threat of termination, Central Vermont then filed a tariff amendment that now threatens to impose a heavy termination charge on Connecticut Valley if it does cancel its contract. FERC (which more or less invited the amendment) has allowed the amendment to go into effect

> provisionally and, while FERC may in due course disallow the charge or reduce its amount, the amendment is in force for the time being. See 82 F.E.R.C. P 61,237, at 61,909 (1998) ("Central Vermont's proposed exit fee is hereby accepted for filing and suspended for a nominal period, to become effective on March 14, 1998, subject to refund. . . ."). Further, the state commission has now, in its Vacation Order, explicitly withdrawn the prior ruling that Connecticut Valley should terminate its requirements contract. In sum, the Commission's prior justification for disallowing the pass-through has evaporated. *Patch VIII*, 221 F.3d at 202; Pet. App. 8-9.

The Court of Appeals also rejected the NHPUC's contention that Connecticut Valley was imprudent for not terminating RS-2 before Central Vermont filed its exit-fee application with FERC. Given the one-year termination notice required under RS-2, Central Vermont could always have filed for an exit fee before RS-2 was actually terminated. *Id.* at 203; Pet. App. 10. Nor did the District Court's injunction requiring full recovery of Connecticut Valley's RS-2 costs run afoul of the "*Burford* doctrine," *Burford v. Sun Oil Co.*, 319 U.S. 315, 332-334 (1943), prohibiting federal courts from bypassing a state administrative scheme to decide state law issues and policy. The First Circuit explained that no state law issue was raised since the enforcement of the filed-rate doctrine is premised on the federal Supremacy Clause. *Patch VIII*, 221 F.3d at 203; Pet. App. 11. Consequently, the First Circuit held that "absent a colorable objective justification, the state agency may not disallow, in state rate-making proceedings, costs that were incurred under a federal tariff for a permissible purchase of wholesale power." *Id.* at 204; Pet. App. 11-12.

REASONS FOR DENYING THE WRIT

I. The Petition Distorts the Grounds for the First Circuit's Decision.

The District Court granted summary judgment to Connecticut Valley and Central Vermont on their filed-rate claim because the NHPUC's "complete turnaround of its position regarding the desirability of contract termination completely undermines its rationale" for finding Connecticut Valley's continuing RS-2 purchases imprudent. *Patch VII*, 87 F. Supp. 2d at 64; Pet. App. 26. The First Circuit affirmed for the same reason. Because of its July 22, 1998 order vacating its directive to Connecticut Valley to terminate RS-2, the NHPUC's "prior justification for disallowing the pass-through has evaporated." *Patch VIII*, 221 F.3d at 202; Pet. App. 9.

Despite this clear factual ground for the lower Courts' decisions, the conflict between the two NHPUC orders is not referenced either in the Petition's "Question Presented for Review" or in the Petition's section specifying supposed reasons for granting *certiorari*. Indeed, it is mentioned only once in the entire Petition in the following description of the District Court's decision:

> In its ruling, the district court reviewed the NHPUC's imprudence finding and determined that the NHPUC's Disallowance Order was preempted because it was not "sincerely . . . based on an imprudence determination." *Patch* VII at 64; App. 27. The district court apparently reached this conclusion by interpreting another NHPUC order issued July 22, 1998, in a separate docket, which was unrelated to the imprudence determination, as *prohibiting* CVEC from terminating the RS-2 Contract. *Patch* VII at 64; App. 27. (Petition at 5; emphasis in original)

When the Petition then describes the grounds for the First Circuit's decision, it entirely ignores the July 22, 1998 NHPUC

order and claims that the Court of Appeals relied merely upon Central Vermont's exit-fee application at FERC:

> This time, however, the First Circuit affirmed the district court, finding, upon review of the NHPUC's imprudence determination, that termination of the RS-2 contract "apparently would be self-defeating." *Patch* VIII at 202; App. 9. In affirming the district court, the First Circuit also found that NHPUC lacked a "colorable objective justification" for the Disallowance Order. *Patch VIII* at 204; App. 11-12. ***The First Circuit apparently based its determination on the application by CVPS before the Federal Energy Regulatory Commission ("FERC") for an "exit fee."*** The exit fee would impose, subject to refund, a termination charge on CVEC if it cancelled its contract. The First Circuit found that the imposition of the exit fee, and the prospect of a "potentially heavy financial penalty" caused the NHPUC's prior justification for disallowing the pass-throughs to "evaporate." *Patch* VIII at 202; App. 9. (Petition at 5-6; emphasis added)

That is manifestly *not* what the First Circuit held. The First Circuit's statement, quoted by the NHPUC above, that the basis for the imprudence determination had "evaporated" is part of that Court's holding that the NHPUC's July 22, 1998 order had eliminated the rationale for its imprudence finding. The NHPUC chose not to quote or even refer to the First Circuit's key statements italicized below:

> ***Further, the state commission has now, in its Vacation Order, explicitly withdrawn the prior ruling that Connecticut Valley should terminate its requirements contract.*** In sum, the Commission's prior justification for disallowing the pass-through has evaporated.

> *The Commission says on appeal that its Vacation Order only nullified its prior order requiring Connecticut Valley to terminate the contract and did not affirmatively order the utility to continue buying under the contract. The lack of an affirmative order is irrelevant: the RS-2 contract requiring purchases is binding on Connecticut Valley unless terminated; termination now apparently would be self-defeating because it would give rise to the prospect of a potentially heavy financial penalty that the state commission does not want; and so long as purchases from Central Vermont continue to be legitimately made under the contract, Connecticut Valley must pay the FERC tariff rate, and the state commission must allow it to reflect that rate in its own charges. Patch VIII*, 221 F.3d at 202-203; Pet. App. 9-10 (emphasis added; footnote omitted).

The NHPUC's distortion of the First Circuit's holding in an attempt to create an apparently compelling *certiorari* question violates this Court's fundamental expectation of candor and accuracy from any petitioner seeking to have its case heard. When a petition fails to provide all the pertinent circumstances underlying the question presented for review, a burden is imposed on this Court's time and resources given the vast number of *certiorari* petitions filed each year. As the Court said many years ago when it dismissed a case because of the parties' failure to provide all relevant factors underlying the decision under review:

> [W]e think it was incumbent upon counsel for both sides to see that the petition and reply thereto disclosed the real situation. The oversight has resulted in unfortunate delay and needless consumption of time.

> . . . Unless these [*certiorari* petitions] are carefully prepared, contain *appropriate references* to the record and present with *studied accuracy, brevity and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket.

Furness, Withy & Co., Ltd. v. Yang-Tsze Ins. Ass'n, Ltd., 242 U.S. 430, 433-434 (1917) (emphasis in original).

Here, the NHPUC has to the contrary made a "studied" effort to distort the First Circuit's ruling. The NHPUC argues that in *Patch V* and *VI* (authored by Judge Boudin) the First Circuit properly held that the District Court was required to defer to the NHPUC's imprudence determination, but that in *Patch VIII* (also authored by Judge Boudin) the Court of Appeals "without explanation, simply abandoned the limitations it had seemingly embraced" in its earlier decisions. Petition at 26. The NHPUC fails even to mention the First Circuit's discussion of the NHPUC's July 22, 1998 order vacating its directive to Connecticut Valley to terminate RS-2, and again erroneously attributes the First Circuit's decision to Central Vermont's mere filing of an exit-fee application at FERC. *See* Petition at 26-28. Thus, the NHPUC, intent on distorting what the First Circuit held, does not even challenge the Court of Appeals' interpretation of the NHPUC's July 22, 1998 order. Nevertheless, the First Circuit meticulously explained why it was required, as a matter of federal law, to determine whether the NHPUC's orders provided a justified reason under the filed-rate doctrine for not allowing Connecticut Valley full recovery of its

FERC-approved RS-2 costs. Citing *Howlett v. Rose*, 496 U.S. 356, 366 (1990),[6] the First Circuit stated that:

> [W]e are not concerned here with whether the imprudence finding is proper under state law but rather with whether, given its substance and context, it furnishes a basis for the state commission to ignore an otherwise controlling FERC tariff. In such cases, the "adequacy" of an asserted "independent state ground" is — indeed, under the Supremacy Clause must be — an issue of federal law. Burford does not license a state to ignore FERC tariffs merely by saying, without any present rational basis, that the purchase is "imprudent." This is so even if the Commission's "imprudence" finding has not been withdrawn and is still tolerated under state law.
>
> Nor is it of any moment whether the Commission has, or has not, acted in good faith in refusing to allow Connecticut Valley to collect the

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6. *Howlett, id.* at 366 n.14, held that:

> [T]his Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds "fair or substantial support" in state law. See, e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 234 (1969); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 454 (1958); Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U.S. 537, 540 (1930). The reasons for that rule rest on nothing less than this Court's ultimate authority to review state court decisions in which "any title, right, privilege or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257(a); see Martin v. Hunter's Lessee, 14 U.S. 304, 1 Wheat, 304 (1816). "To hold otherwise would open an easy method of avoiding the jurisdiction of this court." Terre Haute & Indianapolis R. Co. v. Indiana ex rel. Ketcham, 194 U.S. 579, 589 (1904) (Holmes, J.).

> FERC tariff charges. Indeed, we assume throughout that the Commission is motivated simply by a desire to secure lower rates for New Hampshire consumers. But absent a colorable objective justification, the state agency may not disallow, in state rate-making proceedings, costs that were incurred under a federal tariff for a permissible purchase of wholesale power. *Patch VIII*, 221 F.3d at 203-204; Pet. App. 11-12 (footnote omitted).

By distorting the First Circuit's opinion to provide a false basis for challenging its decision as an inexplicable departure from its earlier rulings under the filed-rate doctrine, the NHPUC has done a disservice to the Court of Appeals which has, throughout these proceedings, given great deference to the NHPUC's orders, and also to this Court which must waste time on a Petition that is not candid and accurate and does not raise a substantial issue. The question which the NHPUC has raised for review is not properly presented, and accordingly the Petition should be denied.

II. The First Circuit's Decision Does Not Conflict with this Court's Decisions or with the Decisions of Other Circuits and Does Not Raise a Federal Legal Issue Requiring Review by this Court.

Once the grounds for the First Circuit's decision are properly understood, it is clear that there is no reason for this Court to grant review.

A. The First Circuit Properly Applied the Filed-Rate Doctrine.

The First Circuit's decision is fully consistent with — indeed, compelled by — this Court's filed-rate case law:

> In this case as in Nantahala we hold that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale

> price. . . Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 373 (1988), *quoting from Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965, 966 (1986).

The First Circuit correctly applied the filed-rate doctrine under these governing decisions. Once the NHPUC vacated its directive to Connecticut Valley to terminate its RS-2 purchases so that Central Vermont's exit-fee would not immediately become effective, Connecticut Valley's RS-2 purchases must be deemed legitimate. As the Courts below held, and as common sense and fairness dictate, the NHPUC cannot have it both ways by requiring Connecticut Valley to continue purchasing under RS-2 but denying full recovery of its RS-2 costs. By attempting to do so, the NHPUC plainly challenged the reasonableness of the FERC-approved RS-2 wholesale rates, which violates the holdings of *Mississippi Power & Light* and *Nantahala*.

B. The Johnson Act Was Not Violated.

The NHPUC admits that the Johnson Act is not violated if the state agency's order conflicts with a federal statute or federal agency determination. Petition at 7. However, the NHPUC fails to acknowledge the First Circuit's holding that the NHPUC's orders refusing to allow Connecticut Valley to recover all its wholesale costs violate the governing FERC-approved tariff. Instead, the NHPUC creates a "strawman" — that the First Circuit reviewed and reversed the NHPUC's state-law imprudence determination, which is impermissible under the Johnson Act. Petition at 27. The First Circuit did no such thing. Indeed, the Court of Appeals stressed that it was "not concerned" with the NHPUC's imprudence decision under state law.

Patch VIII, 221 F.3d at 203; Pet. App. 11. What the First Circuit did hold was that the NHPUC, as a matter of federal law under the filed-rate doctrine, could not order Connecticut Valley to continue its RS-2 wholesale power purchases under rates deemed reasonable by FERC, but then refuse to permit Connecticut Valley to recover all those FERC-approved costs through its retail rates. *Id.* The NHPUC order to which the First Circuit deferred was its order — issued 17 months after its imprudence determination — that vacated its directive to Connecticut Valley to terminate RS-2. Consequently, the question presented to this Court by the NHPUC is entirely bogus: Neither the District Court nor the First Circuit "reviewed" the NHPUC's imprudence determination, nor did those Courts violate the Johnson Act by enforcing the filed-rate doctrine.

C. There Is No Conflict among the Circuits.

By mischaracterizing the First Circuit's holding, the NHPUC attempts to create the appearance of a conflict among the Circuits on the validity of the so-called *Pike County* exception to the filed-rate doctrine. *See Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983). *Pike County* held that by questioning the prudence of a utility's purchases under a FERC-approved wholesale rate rather than the rate itself, a state agency did not violate the filed-rate doctrine. Although this Court has twice reserved decision on the validity of the *Pike County* exception, *Mississippi Power*, 487 U.S. at 373-374; *Nantahala*, 476 U.S. at 972, the Third Circuit, as well as the First Circuit in this proceeding, have accepted it. *See Kentucky West Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir.), *cert. denied*, 488 U.S. 941 (1988); *Patch V*, 167 F.3d at 35-36.[7]

7. Although the NHPUC contends that the Fifth Circuit also accepted the *Pike County* exception in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 911 F.2d 993 (5th Cir. 1990) ("*NOPSI IV*"), *cert. granted*, 499 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991), in fact the Fifth Circuit expressly said that "*Nantahala* established that (Cont'd)

However, contrary to the NHPUC's contention, the First Circuit in *Patch VIII* did not disavow its adherence to the *Pike County* exception, but found instead that the NHPUC's switch in position on RS-2 termination eliminated the factual basis for applying that exception:

> [W]hile the Supreme Court left the issue open, we held in Patch V that a state commission could disallow costs, even where they reflected payments required under a federal tariff, where the state agency had a colorable independent state ground for finding that the purchaser should not have made the purchase. 167 F.3d at 35; see also Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600, 608-09 (3d Cir.), cert. denied, 488 U.S. 941, 102 L. Ed. 2d 355, 109 S. Ct. 365 (1988). And, initially, the Commission did make a colorable ruling in its Disallowance Order that Connecticut Valley's continued purchasing from Central Vermont was imprudent, given Connecticut Valley's apparent opportunity to terminate its contract on one year's notice and switch to cheaper — albeit possibly short-term — power from other suppliers. . . .
>
> [T]he state commission has now, in its Vacation Order, explicitly withdrawn the prior ruling that Connecticut Valley should terminate its requirements contract. In sum, the Commission's prior justification for disallowing the pass-through has evaporated. *Patch VIII*, 221 F.3d at 202; Pet. App. 8-9.

(Cont'd)
the *Pike Co.* line of cases did not apply to facts like ours; *Mississippi Power and Light* established specifically that they do not apply to our facts." 911 F.2d at 1001. *NOPSI IV* did not deal with the prudence of a utility's purchase of wholesale power, but instead addressed the question whether the New Orleans Council had properly refused to allow the utility to recover certain costs in its retail rates because the utility had failed to prudently diversify its power supply portfolio. *Id.* at 998-999.

The NHPUC's transparent attempt to create the appearance of an inter-circuit conflict must be emphatically rejected. As Chief Justice Taft cautioned long ago, only the presence of a real conflict justifies adding a case to this Court's crowded docket:

> It is manifest from this review of the conclusions in the two circuits . . . that they were really in harmony and not in conflict and that there was no ground for our allowing the writ of certiorari to add to an already burdened docket. . . . [I]t is very important that we be consistent in not granting the writ of certiorari except . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 392-393 (1923).

D. The Petition Raises Only an Indisputable Factual Issue.

The only issue that the NHPUC could properly raise in this Court is factual: Did the NHPUC, through its July 22, 1998 order, direct Connecticut Valley not to terminate RS-2? The District Court found that the NHPUC had switched positions and no longer wanted Connecticut Valley to terminate its RS-2 purchases from Central Vermont:

> [A]n undisputed fact . . . summarily blunts defendant's position as a matter of law. On July 22, 1998, defendant *rescinded* its previous directive to plaintiff, contained in the Stranded Cost Recovery Order, to terminate the RS-2 Rate Schedule. See Order No. 22,986. This action was obviously based on defendant's desire to avoid the potentially severe adverse consequence of the purchase contract's termination, namely, the imposition of an exit fee on plaintiff that defendant would be required to pass through to New Hampshire retail customers. See id.

> . . . Clearly, defendant's complete turnaround of its position regarding the desirability of contract termination completely undermines its rationale for the Disallowance Order. Although the two orders were distinct, the Disallowance Order and the Stranded Cost Recovery Order were both based on the premise that contract termination in early 1997 was the desired course of action. The new order demonstrates that defendant no longer accepts this premise, and thus cannot sincerely claim that the Disallowance Order is based on an imprudence determination. However, defendant offers this Court no other rationale besides imprudence for its disallowance of the pass-throughs. *Patch VII*, 87 F.Supp.2d at 64; Pet. App. 26-27 (emphasis in original).

The First Circuit affirmed this factual finding. *Patch VIII*, 221 F.3d at 202-203; Pet. App. 7-10. Since an indisputable factual finding is hardly grist for this Court's mill, the NHPUC avoided raising in its Petition any question about the meaning and effect of its July 22, 1998 order. However, seeking *certiorari* through a distortion of the relevant facts plainly cannot be tolerated. When this Court in *Conway v. California Adult Authority*, 396 U.S. 107, 109-110 (1969), realized "that the actual facts simply do not present the issue for which certiorari was granted by us," it dismissed the writ of *certiorari* as improvidently granted:

> In this state of affairs we decline to adjudicate this case. Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court. *Id.* at 110. Here, clearly, it would be improvident to grant *certiorari* since the relevant facts and circumstances are simply not what the Petition represents them to be.

CONCLUSION

Because the First Circuit's decision is clearly correct and the Petition raises no properly presented legal issue remotely justifying this Court's discretionary review, respondents ask the Court to deny the Petition.

Respectfully submitted,

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